DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB−2947/1dn
JTK:bjk:md

May 26, 2009

Representative Pope−Roberts:

1. Proposed s. 11.01 (16) (a) 3. of this draft would extend this state's campaign finance reporting system to include reporting of certain mass communications occurring within a specified proximity to an election regardless of whether they would be reportable currently. In *McConnell v. F.E.C.*, 124 S. Ct. 619 (2003), at pp. 696−697, the U.S. Supreme Court sanctioned analogous provisions in the Federal Election Campaign Act (F.E.C.A.) in the face of a First Amendment challenge because the reporting was considered to be the functional equivalent of express advocacy, which, since *Buckley v. Valeo, et al.*, 96 S. Ct. 612 (1976) has been judicially sanctioned as permissible reportable activity. The result of this conclusion is that if corporations are prohibited from making reportable contributions or disbursements, a corporation is not able to pay directly for a mass communication of this type. However, in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), the U.S. Supreme Court, at p. 2667, modified its decision in *McConnell* by holding that a corporation could not be prohibited from making a communication unless the communication was the functional equivalent of express advocacy. In that case the court found that a proposed communication, which involved a popular appeal to contact legislators regarding a legislative issue and that mentioned the name of a candidate at an election within 30 days of that election, was not, by itself, the functional equivalent of express advocacy. The U.S. Supreme Court did not, however, address F.E.C.A.'s disclosure requirements in that decision. In *Citizens United v. F.E.C.*, 530 F. Supp. 2d 274 (D.D.C. 2008), however, at p. 281, the U.S. District Court reaffirmed those requirements. The U.S. Supreme Court has heard an appeal of the *Citizens United* decision and a decision from the Court is expected very shortly. There is a significant probability that a court would find an inconsistency between the treatment of s. 11.01 (16), stats., by this draft and the holding of the U.S. Supreme Court in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), which permitted prohibition of corporate mass communications only when they are express advocacy or its functional equivalent. This draft provides that a communication qualifies as a permissible corporate mass communication only if it does not support or oppose a candidate's record on an issue. This requirement does not appear in the Court's core test set forth on p. 2667 of that opinion but rather is based upon a response to the dissent in footnote 6 and does not appear in the corresponding test adopted by the F.E.C. in 11 C.F. R. 114.15. I think this requirement may be a fair reading of the decision, but it is not free from doubt. The draft also specifically requires

registration and reporting and bans corporate mass communications whenever a mass communication refers to a judicial office and either focuses on and takes a position for or against a judicial candidate's position on an issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. Because this requirement does not set forth a window when it is operative and sets forth a separate rule for judicial races, it does not parallel the core test that received the approval of the Court as interpreted by the F.E.C., and this will affect the probability that a court may distinguish the draft's test for determining the functional equivalent of express advocacy from the Court's approved test. In addition, it is possible that the Court's stance may shift when the decision in *Citizens United* is issued.

2. You may wish to reflect on proposed s. 11.05 (3) (s) of the draft, which requires a new registrant to disclose any mass communication, as defined in proposed s. 11.01 (16) (a) 3. of the draft, that the registrant made prior to registration at the time that the registrant registers and how this provision should apply to a corporation or cooperative that registers after the day that the act resulting from this draft becomes law.

3. This draft includes two appropriations for which I have specified "$–0–" for expenditure in fiscal years 2009–10 and 2010–11. When you know the dollar amounts that you need to include in the proposal, contact me and I will either redraft the proposal or draft an amendment, whichever is appropriate. Because the biennial budget act repeals and recreates the appropriation schedule under s. 20.005 (3), stats., if the bill resulting from this draft becomes law before enactment of the budget act and the budget act does not include the funding provided in this draft, the effect will be to eliminate the funding provided in this draft. To preserve the funding of these positions, you may wish to seek inclusion of the funding in the biennial budget bill.

4. In *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1151 (1995), the U.S. Supreme Court found unconstitutional, under the First Amendment, a statute that prohibited publication or distribution of any material designed to promote the nomination or election of a candidate or the adoption or defeat of any issue or to influence the voters at any election without identification of the name and address of the person who publishes or distributes the material. The court, however, indicated that a state's interest in preventing fraud might justify a more limited disclosure requirement (115 S. Ct. at 1522). Further, the court indicated that it still approved of requirements to disclose independent expenditures, which it upheld in *Buckley v. Valeo*, et. al., 96 S. Ct. 612, 661–662 (1976), (*McIntyre*, 115 S. Ct. at 1523). In view of this opinion, the constitutionality of disclosure statutes such as proposed s. 11.522, relating to labeling of certain political communications by candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit is not clear at this point. We will have to await further decisions from the court before we know the exact limits of a state's ability to regulate in this field.

5. The lower federal courts have disagreed as to whether statutes such as proposed ss. 11.512 (2) and 11.513 (2), which increase the public financing benefit available to a candidate for the office of justice of the supreme court when independent disbursements are made against the candidate or for his or her opponents, or when the candidate's opponents make disbursements exceeding a specified level, may result in

an abridgement of the First Amendment rights of the persons making the disbursements. See *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), in which a Minnesota law that included provisions similar to proposed ss. 11.512 (2) and 11.513 (2) was voided. See also *Daggett v. Comm. on Governmental Ethics and Election Practices*, 205 F.3d 445, 463–65, 467–69 (1st Cir. 2000), in which a similar law in Maine was not found to abridge the First Amendment. The U.S. Supreme Court has not yet spoken on this issue.

6. Proposed ss. 11.12 (8) and 11.512 (1), which impose additional reporting requirements upon candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, will likely be found unenforceable as a result of a recent decision of the U.S. Supreme Court in *Davis v. F.E.C.*, 128 S. Ct. 2759 (2008), where the court held at p. 2767, that asymmetric disclosure requirements imposed by a statute upon two different candidates for the same office at the same election contravene the First Amendment because they impose a substantial burden upon the right of candidates to use personal funds [or implicitly, nonpublic funds] that is not justified by any compelling state interest. Note also that proposed s. 11.12 (8) affects other provisions of the draft under SECTION 163 (3), the nonseverability clause.

If you would like to discuss these or any related matters further, please let me know.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266–6778